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Supreme Court, U. S.
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in the

Supreme Court

of the

United States

OCTOBER TERM, 1972

NO. 72-1432

FERNANDO ACOSTA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
to
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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OPINIONS OF THE COURT BELOW

The first Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit dated June 29,

1972 is reported in 462 F.2d 740. A copy is attached as Appendix "A".

The second Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 12, 1973 and is unreported. A copy is attached as Appendix "B".

An Order of the same Court denying a Petition for Rehearing and a Petition for Rehearing En Banc was entered on March 26, 1973. A Copy is attached as Appendix "C".

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

I.

IN A PROSECUTION CHARGING A CONSPIRACY TO IMPORT AND SELL NARCOTICS, IS THE ACCUSED DENIED A FAIR AND IMPARTIAL TRIAL WHEN TWO BOOKS DEALING WITH NARCOTIC ADDICTION AND WITH LARGE-SCALE DRUG BUSINESS CARRIED ON BY CRIMINAL SYNDICATES AND AT LEAST ONE PAMPHLET DESCRIBING NARCOTICS ARE PRESENT IN THE JURY ROOM DURING THE TRIAL?

II.

WHERE AN ACCUSED IS CHARGED IN ONE COUNT WITH A NARCOTICS CONSPIRACY AND IN A SECOND COUNT WITH THE SUBSTANTIVE ACT OF FACILITATING THE TRANSPORTATION OF SIX POUNDS OF COCAINE, IS THE ACCUSED DENIED A FAIR AND IMPARTIAL TRIAL ON THE CONSPIRACY COUNT WHEN THE SIX POUNDS OF COCAINE ARE ADMITTED INTO EVIDENCE IN SUPPORT OF THE SUBSTANTIVE COUNT, AND THE CONVICTION ON THE SUBSTANTIVE COUNT IS THEREAFTER REVERSED?

III.

WHEN GOVERNMENT WITNESSES, WHO ARE ALLEGED CO-CONSPIRATORS, GIVE CONFLICTING AND CONTRADICTORY TESTIMONY ON DIRECT EXAMINATION, IS IT PREJUDICIAL ERROR TO DENY THE ACCUSED'S REQUEST TO EXAMINE THE GRAND JURY TESTIMONY OF SUCH WITNESSES FOR THE PURPOSES OF IMPEACHMENT ON CROSS EXAMINATION, PARTICULARLY WHEN SOME OF THE WITNESSES UTILIZED THEIR GRAND JURY TESTIMONY IN ADVANCE OF TRIAL TO REFRESH THEIR RECOLLECTIONS?

FEDERAL STATUTES INVOLVED

The Federal Statute involved in this Petition is as follows:

Title 21, United States Code, Section 174 (repealed October 27, 1970):

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

STATEMENT OF THE CASE

On October 14, 1969, Petitioner Acosta, together with twelve additional Defendants were indicted in Count I for a conspiracy to import narcotic drugs into the United States and to receive, buy, sell and facilitate their transportation to various parts of the United States after such importation.

Count II charged Petitioner and six additional Defendants with the substantive act of receiving and facilitating the transportation of 6 pounds, 10 ounces of cocaine on September 27, 1968.

Of the thirty-eight overt acts alleged in the Indictment, Petitioner was named in eight. The Trial Court charged out seven of those eight for lack of proof and no proof whatsoever was adduced as to the said eighth overt act.

The Government's first witness was Marcos Hernandez-Huertas, a convicted felon, bail jumper and narcotics user, who characterized himself as the biggest narcotics dealer in San Juan. He contradicted himself on dates and did not know how long he had been in prison. He said he met Petitioner in Puerto Rico toward the end of 1964, or the beginning of 1965 or during the summer of 1964. The Indictment alleges that the conspiracy began during the summer of 1965.

At the conclusion of his direct testimony, Petitioner moved the Court to have the witness' grand jury testimony produced upon the ground that a particularized need had been shown to use those minutes on cross examination for impeachment. The Court denied the motions.

The next material witness was Frank Cocossa, an alleged co-conspirator, bond jumper, heroin and cocaine addict, dealer in narcotics, and felon, who admitted he was guessing on the dates that he allegedly recruited girls to smuggle cocaine into the United States. A Motion by defense counsel to examine his grand jury testimony was denied. This witness did not mention the name of Petitioner but at this point the Judge stated in the presence of the jury. ". . . we had a conspiracy and we want to get all of these things in or out." A motion for mistrial was denied.

During the next five days, the Government adduced testimony concerning the smuggling of cocaine into the United States from a series of witnesses, all young ladies who were living with men without benefit of marriage and who were narcotic addicts, users and dealers. At least one of them admitted having committed perjury during the trial, but motions to inspect their grand jury testimony was denied, and the Court, in the presence of the jury, referred to one of the co-defendants on trial as a co-conspirator".

None of the foregoing so-called "courier" witnesses mentioned the name of Petitioner or indicated that they knew him or had ever heard of him, but described having been recruited and paid by other persons to smuggle cocaine into the United States from Managua.

The second witness in the three week trial who mentioned the name of Petitioner was Oscar Estrada, a prison inmate and a narcotics dealer against whom additional felony charges were pending. He testified that he saw Petitioner on only one occasion during the witness' allegedly

large scale and almost daily narcotic dealings, and that single instance was when the Petitioner was present and allegedly participated in negotiations for the sale of cocaine. The remainder of his testimony, insofar as it related to Petitioner, consisted of hearsay statements from alleged co-conspirators made out of the presence of this defendant, and who were not present at the trial and who did not testify. Although this witness had read his grand jury testimony the previous day in order to refresh his memory, a motion to produce that testimony for use on cross examination was denied.

Luis Gomez, an alleged co-conspirator and felon, sentenced to life imprisonment for the rape and robbery of a co-defendant on trial, and who used narcotics, limited his testimony concerning Petitioner to the single statement that a co-defendant "mentioned the name of Fernando Acosta". Because of material differences between his trial testimony and his Jencks material, a request was made and denied to examine the grand jury minutes of his testimony.

Customs Agent Romano told the Court and jury that on September 27, 1968, six bags of cocaine were seized from one Denise Betancourt (substantive Count II of the Indictment) at the United States Customs Station in Miami, Florida, after she alighted from a Lanica Airline flight. These six large bags of cocaine were received into evidence as Government's Exhibit 30 over objection and subject to connection through the testimony of Miss Betancourt. Later, Miss Betancourt refused to testify upon the ground that her answers might tend to incriminate her. There was no testimony or evidence relating to any other

activities of Miss Betancourt except for this isolated incident, and this exhibit is the solitary physical evidence of cocaine submitted to the jury.

The Government rested its case and a motion for judgment of acquittal by Petitioner, and for a mistrial because of the introduction of exhibits of cocaine without connection, and to strike all hearsay testimony, and to strike from the Indictment all eight overt acts naming Petitioner, were denied.

During the first week of trial, the trial judge instructed the jury, including one alternate juror, that when they are in the jury room and wish to discuss the testimony which they have just heard among themselves, it would be alright. Upon objection, the Court later changed the instructions and again admonished the jury not to discuss the case among themselves until all the evidence is in.

During the course of the trial and prior to the final deliberation by the jury, a conference between the Court and counsel was held in the jury room. It was discovered that two books were on the table in the jury room, one called "Merchants of Misery" by J.A. Buckwater, and the other called "Up Tight" by John Gimenez, which specifically deal with the narcotics problem. The books had been checked out of a library in Fort Lauderdale, Florida. A Motion for a Mistrial was denied.

The books were discovered on the seventeenth trial day, the last day of taking testimony before final argument, when the trial judge and attorneys went into the jury room for the court to hear a legal argument out of

the hearing of the jury. All defendants called the books to the attention of the court and moved for a mistrial, which was denied. The books were left in the jury room. A motion was made that they be obtained and the prefaces read into the record. The trial judge declined on the ground that to take the books away from the jury would only call attention to the problem. No inquiry was made of jurors to ascertain the extent, if any, that the books had been seen by members of the jury and discussed. Since no inquiry was ever made, the exact circumstances of the books being in the room were not established. No corrective or cautionary instruction was given when the books were discovered and called to the court's attention or when the jury was charged. However, at the end of the proceedings on the day of discovery the court instructed the jury not to read newspapers or listen to news broadcasts, and added this:

> "Let me say one other thing. I hate to restrict you on your reading. However, until after this case is over, don't read anything, unless you get a letter from someone in your family. If you have to read any books or anything that might give you new and independent ideas about any of this matter, don't discuss it with each other."

As previously related, upon conclusion of the direct examination of each of several government witnesses, various of the defendants moved for production of the respective witnesses' testimony given before the grand jury. In each instance the motion was denied. Some of the witnesses had read the transcript of their respective grand jury testimony in preparation for testifying at the trial. The

ground asserted for production was defendants' claim that the testimony at trial was inconsistent within itself, inconsistent with other statements, and inconsistent with the indictment. As to some of the witnesses the trial judge made an incamera inspection, but, with no apparent reason for the distinction, declined to examine that of other government witnesses of no less importance.

Petitioner was convicted on both counts.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the conviction on substantive Count II and remanded to the District Court on conspiracy Count I with directions to conduct an evidentiary post-trial hearing, because "the defendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the books affected the verdict."

The trial judge conducted an evidentiary hearing on August 7, 1972, more than two years after the verdict, during which each juror and alternate was interrogated. The responses of the jurors demonstrated that alternate juror Johnston, a dentist, brought the two prejudicial books and at least one other pamphlet into the jury room. Six of the jurors, excluding Johnston, saw at least one of the books which were lying open upon the table. At least one of the jurors saw a pamphlet relating to drugs and narcotics. One juror stated that she read a portion of one of the books and that the other jurors questioned Johnston about the narcotics mentioned in the book. Another juror recalled that there might have been a discussion about the drugs and narcotics in the books and pamphlet. Johnston himself remembered that other jurors looked at the books and that he discussed definitions of drugs with them.

On September 2, 1972, the trial court filed Findings of Fact and Conclusions of Law and concluded that there was not a reasonable possibility that the verdict was affected by the presence of the extraneous matter in the jury room.

On February 12, 1973 the United States Court of Appeals for the Fifth Circuit affirmed the Findings and Conclusions of the District Court on remand and affirmed the convictions under Count I.

ARGUMENT FOR ALLOWANCE OF WRIT

I & II

Petitioner contends that this Petition should be granted for the reason that the Court of Appeals has rendered a decision and decided a question in a way in conflict with **Marshall v. United States,** 360 U.S. 310, 79 S.Ct. 1171 (1959) which was decided by this Court, and with **United States v. Milanovich,** 303 F.2d 626 (1962) which was decided by the United States Court of Appeals for the 4th Circuit.

In the case at bar, the United States Court of Appeals, 5th Circuit (Paz v. United States, 462 F.2d 740) decided that "If admission into evidence of the cocaine brought into the country by Denise Bethancourt was error, as to the conspiracy count, it was harmless beyond a reasonable doubt."

The cocaine in question, consisting of six large kilo bags, was the only cocaine offered or received into evidence during the trial. It was received into evidence only

in support of substantive Count II of the indictment, and the conviction on that count was reversed.

After a remand on conspiracy Count I of the indictment, the Court of Appeals decided that the two books and pamphlet on narcotics which were brought into the jury room and were seen, read and discussed by the jurors, could not possibly have affected the verdict.

In **Marshall v. United States,** supra, the question before this Court in a drug case was whether exposure of some jurors to newspaper articles about the accused was so prejudicial as to warrant exercise of the Supreme Court's supervisory power to order a new trial by granting a Petition for Certiorari. The Supreme Court decided the question in the affirmative, and said:

> "The trial judge on learning that these news accounts had reached the jurors summoned them into his chamber one by one and inquired if they had seen the articles. Three had read the first of the two we have listed above and one had read both. Three others had scanned the first article and one of those had also seen the second. Each of the seven told the trial judge that he would not be influenced by the news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles. The trial judge, stating he felt there was no prejudice to petitioner, denied the motion for mistrial.
>
> The trial judge has a large discretion in ruling on the issue of prejudice resulting from the

reading by jurors of news articles concerning the trial. Holt v. United States, 218 U.S. 245, 251, 31 S.Ct. 2, 6, 54 L.Ed 1021. Generalizations beyond that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence Cf. Michelson v. United States, 335 U.S. 469, 475, 69 S.Ct. 213, 218, 93 L.Ed. 168. It may indeed be greater for it is then not tempered by protective procedures.

In the exercise of our supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts (Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257; McNabb v. United States, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819) we think a new trial should be granted."

In **United States v. Milanovich**, supra, also an alleged prejudicial publicity case, the 4th Circuit Court of Appeals said:

"When discovery of such events is made after the jury is sworn, then a new trial is mandatory unless the Government can affirmatively show that the jurors could not have been affected by it. See Marshall v United States, 360 U.S. 310,

> 79 S.Ct. 1171, 3 L.Ed. 2d 1250 (1959); Shepherd v. Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed. 740 (1951) (concurring opinion). In the latter instance the burden is not upon the defendant to establish that he was prejudiced thereby."

In the case at bar, the Government never met its affirmative burden to demonstrate that the erroneously admitted six dirty bags of cocaine could not have affected the verdict of the jury. Indeed, such demonstrative evidence, standing alone, denied Petitioner a "fair determination of his guilt or innocence free from bias, passion or prejudice." **Braswell v. United States,** 200 F.2d 597, 602 (5th Circuit 1952). See also **Little v. United States,** 73 F.2d 861 (10th Cir. 1934)

Even more prejudicial to Petitioner was the presence in the jury room of the two books and a pamphlet supplying opinions and histories of drug and narcotic importation and addiction from authors who obviously would not have been permitted to testify at the trial.

After remand for an evidentiary hearing on this latter matter, the Court of Appeals decided "that there is no reasonable possibility that the books * * * affected the verdict." Nevertheless, at the remand hearing it was determined that at least one juror read portions of the books and others discussed the contents. The trial court instructed the jury:

> "Let me say one other thing. I hate to restrict you on your reading. However, until after this case is over, don't read anything, unless you get a letter from someone in your family. If you

> have to read any books or anything that might give you new and independent ideas about any of this matter, don't discuss it with each other."

The Court of Appeals found this instruction:

> "Rather than being an instruction not to read extrinsic matter concerning the subject matter of the trial, this was subject to the interpretation that such reading was permissible so long as not discussed with other persons."

Eighty years ago the Supreme Court held it to be reversible error when the trial judge allowed an entire book to go into the jury room without sealing off the pages not admitted into evidence even though it was not shown that any of the jurors had actually read the inadmissible pages. **Bates v. Preble,** 151 U.S. 149, 14 S.Ct. 277 (1893).

It has been established that on inquiry jurors very frequently consciously or unconsciously do not express honestly their reaction to offensive material which they may have seen. See A.B.A. Standards Relating to Fair Trial and Free Press, 56-57 (Approved Draft, General Commentary, 1968). Furthermore, it is not without significance that cases in recent years in this field, **Irvin v. Dowd,** 366 U.S. 717 **Rideau v. Louisiana,** 373 U.S. 723, **Sheppard v. Maxwell,** 384 U.S. 333, have been departing from the view "that the discretion of the trial judge with regard to these questions is extremely broad and that actual prejudice, not simply the likelihood of harm, must be shown in order to obtain relief." A.B.A. Standards Relating to Fair Trial and Free Press, supra, 113.

Our courts have traditionally upheld the position that verdicts should be set aside where it is shown that the impartiality of jurors may have been affected or where tainted material has come before the jury. It is impossible to ascertain the effect material in the jury room had upon the minds of the jurors in reaching their verdict. It is just this situation which demands reversal. An analysis of prior cases pertaining to incidents where out-of-court evidence reached the jurors convinces us that Petitioner in the present case was prejudicially denied his right to a fair trial.

III.

Petitioner also contends that this Petition should be granted for the reason that the Court of Appeals has rendered a decision and decided a federal question in a way in conflict with **Dennis v. United States**, 384 U.S. 855, 86 S.Ct. 1840 (1966) which was decided by this Court; **Niro v. United States**, 388 F.2d 535 (1968) which was decided by the First Circuit Court of Appeals; **United States v. Youngblood**, 379 F.2d 365 (1967) which was decided by the Second Circuit Court of Appeals; **United States v. Amabile**, 395 F.2d 47 (1968), vacated on other grounds 394 U.S. 310, 89 S.Ct. 1164, which was decided by the Seventh Circuit Court of Appeals; and **Melton v. United States**, 398 F.2d 321 (1968) which was decided by the Tenth Circuit Court of Appeals.

The Court of Appeals in **Paz v. United States**, 462 F.2d 740, the instant case, decided the question of the production of the grand jury testimony of government witnesses as follows:

"Since **Dennis v. U.S.**, 384 U.S. 855, 16 L.Ed.2d 973 (1966), this circuit has continued to adhere to the rule that the defendant must make a showing of particularized need to be entitled to inspect grand jury minutes. (citations omitted) Our position is contrary to the rule established in some other circuits which dispense with a required showing of a particularized need. (citations omitted) Unlike several courts (citations omitted) we have not read Dennis as equating an asserted need for grand jury minutes in order to impeach a government witness with the particularized need required for inspection. * * * So that the grand jury's realm will be invaded no more than necessary we have approved as the initial step in response to motions for inspection an in camera inspection conducted by the district judge to discover any such inconsistencies."

The trial judge had denied Petitioner access to all minutes of grand jury testimony of government witnesses. As to some of the witnesses, the Court made an in camera inspection, but, with no apparent reason for the distinction, declined even to examine that of other government witnesses of no less importance. Nevertheless, the Court of Appeals affirmed.

This Court, in deciding **Dennis v. United States**, supra, on June 20, 1966, said:

"A conspiracy case carries with it the inevitable risk of wrongful attribution of responsibility to one or more of the multiple defendants. See e.g.

United States v. Bufalino, 285 F.2d 408, 417-418 (C.A. 3d Cir. 1960). Under these circumstances, it is especially important that the defense, the judge and the jury should have the assurance that the *doors that may lead to truth have been unlocked.* In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant fact. Exceptions to this are justifiable only by the clearest and most compelling considerations. For this reason, we cannot accept the view of the Court of Appeals that it is 'safe to assume' no inconsistencies would have come to light if the grand jury testimony had been examined. *There is no justification for relying upon 'assumption.'*

Trial judges ought not to be burdened with the task or the responsibility of examining sometime voluminous grand jury testimony in order to ascertain inconsistencies with trial testimony. In any event, 'it will be extremely difficult for even the most able and experienced trial judge under the pressures of conducting a trial to pick out all of the grand jury testimony that would be useful in impeaching a witness.' Pittsburgh Plate Glass, 360 U.S., at 410, 79 S.Ct., at 1246 (dissenting opinion). Nor is it realistic to assume that the trial court's judgment as to the utility of material for impeachment or other legitimate purposes, however conscientiously made, would exhaust the possibilities. In our adversary system, it is enough for judges to judge. *The determination of what may be useful to the defense can*

properly and effectively be made only by an advocate. The trial judge's function in this respect is limited to deciding whether a case has been made for production, and to supervise the process: for example, to cause the elimination of extraneous matter and to rule upon applications by the Government for protective orders in unusual situations, such as those involving the Nation's security or clearcut dangers to individuals who are identified by the testimony produced.

Because petitioners were entitled to examine the grand jury minutes relating to trial testimony of the four government witnesses, and to do so while those witnesses were available for cross-examination, we reverse the judgment below and remand for a new trial. It is so ordered." (Emphasis supplied)

Various circuits have interpreted *Dennis* in different ways, but most now agree either that particularized need no longer is required, or that the use of grand jury testimony to impeach, refresh the recollection, or test the credibility of a witness, makes out a case of "particularized need."

In **Niro v. United States**, supra, the First Circuit held a denial of the requested minutes not to be prejudicial error only because the testimony of the witness in question was of no substantial materiality; but the Court said:

"In our opinion the only error committed at the trial was the refusal to permit defendants access

> to Ford's grand jury testimony for the purpose of cross-examination. This refusal was not in accord with our view of Dennis v. United States, 1966, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973, as we held, subsequent to the instant trial, in Schlinsky v. United States, 1 Cir. 1967, 379 F.2d 735, cert. denied, 389 U.S. 920, 88 S.Ct. 236, 19 L.Ed. 265."

The Second Circuit took the following position in **United States v. Youngblood,** supra:

> "For the foregoing reasons we direct that at trials commencing after our judgment here is entered, the district courts of this circuit at the request of the defendant should order that the defendant be allowed to examine the grand jury testimony of those witnesses who testify at his trial *without requiring him to show any particularized need for this material;* we are holding that a defendant should be entitled to see all the grand jury testimony of each witness on the subjects about which that witness testified at the defendant's trial." (Emphasis supplied)

The seventh circuit in **United States vs. Amabile,** supra, specifically adopted and approved the **Youngblood** procedure.

The tenth circuit ruled that the grounds utilized in the case at bar do in fact constitute "particularized need" in **Melton vs. United States,** supra:

"In Cargill vs. United States, 10 Cir. 381 F.2d 849, 851, cert. denied 389 U.S. 1041, 88 S.Ct. 781, 19 L.Ed.2d 831, we recognized that a particularized need of the defense for grand jury testimony must be shown before the defense is entitled to the testimony and we interpreted Dennis v. United States, 384 U.S. 855, 86 S.Ct. 1840, 16 L.Ed.2d 973, as holding that '*such need is shown when the defense states that it wishes to use the transcript for the purpose of impeaching a witness, to refresh his recollection, or to test his credibility.*' In support of the motion for inspection, defense counsel said that the grand jury transcript 'will give us an opportunity to establish an inconsistency.' Although the precise language of Cargill is not followed, the purpose of showing an inconsistency is to impeach or test credibility. We believe that the Cargill particularized need test is satisfied." (Emphasis supplied)

In the case at bar, some of the government witnesses had read a transcript of their respective grand jury testimony in preparation for testifying at trial. As to these witnesses and others their testimony at the trial was inconsistent within itself, inconsistent with other statements, and inconsistent with the indictment. Petitioner particularly sought the minutes to impeach them and to test credibility. Fair play seems to dictate that an accused be allowed use of the grand jury minutes for impeachment, particularly when the accused seeks only the testimony pertaining to the subjects testified to at trial.

CONCLUSION

For the foregoing reasons, it is submitted that this Petition for Writ of Certiorari should be granted.

Dated at Miami Beach, Florida this ____ day of April, 1973.

Respectfully submitted,

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By_____
LAWRENCE E. HOFFMAN

HOFFMAN & ST. JEAN
Of Counsel

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true copy of the foregoing Petition for Writ of Certiorari was mailed this ___ day of April, 1973 to Hon. Robert Rust, U.S. Attorney, P. O. BOX 1070, Miami, Florida 33101; Gino Negretti, Esq., 3061 N.W. 7th Street, Miami, Florida; James E. Siff Esq., 401 Broadway, New York N. Y.; William A. Daniel, Esq., 408 Concord Building, Miami, Florida; Max Kogen, Esq., City National Bank Building, Miami, Florida; and Angelo Ali, Esq., 28 West Flagler Street, Miami, Florida.

LAWRENCE E. HOFFMAN

APPENDIX

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28997

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE ESPINOSA, CLARENCE JACKSON and CARLOS INCHAUSTEGUI,

Defendants-Appellants,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(June 29, 1972)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

GODBOLD, Circuit Judge. There were 13 defendants and 23 additional named co-conspirators in this complex and lengthy narcotics case, which concerns drug traffic activities in Miami, New York, Detroit, Nicaragua, South American countries, and elsewhere, and involving

dozens of persons. Four defendants fled and were not tried. In a lengthy trial in Miami, Florida, ending June 23, 1970, one defendant was acquitted. The remaining eight — Paz, Raul Fernandez, Acosta, Lum, Echavarry, Espinosa, Jackson and Inchaustegui—were convicted under Count I, conspiracy to import heroin and cocaine.[1] Five of them—Paz, Acosta, Raul Fernandez, Echavarry and Inchaustegui—were convicted under Count II, transportation and concealment of cocaine[2] All eight appeal.

We reverse the conviction under Count Two. As to several issues, we affirm. And we remand for an evidentiary hearing on the issue of the presence in the jury room of non-evidentiary material relating to drugs and drug traffic.

The government's evidence tended to show a conspiracy of the following general nature. The original actors were defendants Paz, Acosta and Raul Fernandez, who were associated together in drug activities in the New York area. Subsequently Paz and his wife, defendant Dulce Espinosa, went to the Central American city of Managua, Nicaragua, which became their base of operations, while Raul Fernandez and Acosta began to operate principally out of Miami. Illegal shipments of drugs were brought into Miami from Managua and South American points, but principally from Managua, by young American women couriers who entered Miami with parcels of drugs strapped to their bodies. The usual payment to the courier was $1,000. The couriers also transported between Miami and Managua letters, funds, lactose (for

[1]In violation of 21 U.S.C. § 173 and 174.

[2]In violation of 21 U.S.C. § 174.

"cutting" drugs) and even merchandise destined as gifts for Nicaraguan officials. Many of these young couriers were named as co-conspirators but not defendants. Defendant Anna Echavarry accompanied couriers on numerous flights between Miami and Central and South America and assisted in arrangements at these foreign points of origin.

The couriers were recruited by co-conspirator Frank Cocossa, assisted by co-conspirator Gloria Richards. Also Cocossa made several trips between Miami and Managua, where he met Paz a number of times, and he assisted in moving at least one shipment of drugs to New York. Cocossa had been brought into the operation by defendant Inchaustegui, whose activities were chiefly in Miami but who was at times in Managua. Inchaustegui also supplied expense money to couriers, received incoming shipments, and supplied lactose.

Defendants Acosta and Raul Fernandez were active at the Miami end. They supplied drugs to a New York group which included a number of co-conspirators and defendant Lucrecia Lum. Lum also transported, sold and guarded drugs. Defendant Jackson was a purchaser of the ring's drugs, based in the Detroit area. Also he assisted in transportation of drugs. Defendant Raul Fernandez was from time to time engaged in collecting monies due from purchasers.

Facets of the conspiracy were described in detail by several couriers, the recruiters Cocossa and Gloria Richards, two members of the New York group, and several government agents.

1.

There is no merit to the contention that there were multiple conspiracies rather than one. This is a question for the trier of the facts, Koolish v. U.S., 340 F.2d 513 (8th Cir.), cert. denied, 381 U.S. 951, 14 L.Ed. 2d 724 (1965), and it is quite clear that there was sufficient evidence on which to submit it to the jury.

2.

The trial court erred in denying the timely motions of the Count Two defendants for judgment of acquittal on that count, which was the substantive count. Count Two charged that seven named defendants "did fraudulently, knowingly and wilfully receive, conceal and facilitate the transportation and concealment" of approximately six pounds, 10 ounces of cocaine on or about September 27, 1968, at Miami, in violation of 21 U.S.C. § 174. Five of the defendants were among those already described — Paz, Acosta, Raul Fernandez, Echavarry, and Inchaustegui. The other two were Norberto Fernandez, whose motion of judgment for acquittal was granted, and Mario Marrero, who fled and was not tried but was described in testimony as a participant in the conspiracy.

Evidence concerning this particular charge was that on September 27, 1968, a government agent, acting on information the contents of which were unrevealed, put under surveillance deplaning passengers coming into the customs enclosure of the Miami airport. He observed a female passenger, Denise Bethancourt, who had arrived on a Lanica Airline flight from Managua, Nicaragua. He noted that she was bulky around the hips. The agent in-

tercepted her after she had made her customs declaration and had completed a customs inspection. She was searched by female inspectors, who found taped to her body, underneath a girdle, six plastic bags of cocaine. Miss Bethancourt was wearing an "A-line" dress, a loose fitting dress that hangs from the shoulders and does not have a tight or fitted waist.

Prior to the arrival of the Lanica flight the agent checked the area outside of the customs enclosure at which vehicles park to pick up passengers and luggage, and noted a gold Buick Riviera and took its license number. Approximately two weeks before, while surveilling the Miami airport, the agent had observed the same Buick just prior to the arrival of the Lanica flight from Managua, Nicaragua, Also, in September, prior to September 27, the agent had observed the same automobile parked at the residence of Marrero in Hialeah, near Miami. There was ample testimony of Marrero's part in the conspiracy. After taking the license number on September 27, the agent had it checked and found that the car was registered in the name of Gilbert Roque at a Miami address which was shown to be the residence of defendant Acosta, a central figure in the conspiracy. Miss Bethancourt was not seen in or about the Buick at the airport or elsewhere. Her ticket stub showed that she had departed Miami on September 22, 1968.

At trial Miss Bethancourt claimed the privilege against self-incrimination and did not testify. There was no testimony by any of the other couriers, or the recruiters of couriers, or by anyone else, identifying her as a courier for this ring, or as even being in contact with or in the presence of any defendant or co-conspira-

tor, nor was the cocaine which she brought in connected by direct evidence to the conspiracy. In fact her name was mentioned in the testimony with respect to only this single incident at the Miami airport.[3]

To sum up, the evidence on the substantive count was this:

(1) Of a conspiracy, a facet of which was to import cocaine into Miami from Managua, Nicaragua, with testimony tending to show participation therein by each of the convicted Count Two defendants at either the Miami or the Managua end, or both;

(2) Of numerous shipments of cocaine made from Managua to Miami pursuant to the conspiracy and over a period of approximately a year, including September 1968;

(3) Of a modus operandi of shipment the same as that employed by Miss Bethancourt;

(4) Of the presence, in the vicinity of the customs area, of a gold Buick which had been seen earlier at the residence of a participant in the conspiracy and which was registered at the address of a central participant but in another name, and which had been observed at the airport prior to arrival of another filght from Managua.

This is not enough circumstantial evidence on which to convict. A jury could not reasonably conclude that the

[3]Except for one other reference, which was stricken from evidence.

evidence excluded every reasonable hypothesis but that of guilt. Surrett v. U.S. 421 F.2d 403 (5th Cir. 1970); Harper v. U.S., 405 F.2d 185 (5th Cir. 1969). The possibility cannot reasonably be excluded that Miss Bethancourt was acting solely on her own behalf and had no connection with this ring, nor that she was acting as part of another group. There is a suspicion that the Buick was at the airport to meet her, but it is no more than suspicion. The reason for its presence may have been innocent, and, if it was there as part of the conspiracy, the purpose of its presence was not necessarily connected with the arrival of Miss Bethancourt.

Meyers v. U.S., 310 F.2d 801 (5th Cir. 1962), relied upon by the government; is no help to it. In that case the courier attempted to bring across an international bridge marijuana concealed in an automobile door. The codefendant was her husband. He was seen on the bridge less than two hours after his wife was stopped. In his possession was a cologne bottle, and the odor from it was similar to that of the heavily perfumed car driven by his wife. The marijuana was concealed in a position difficult to reach, and the inspector who retrieved it suffered scratches on his arm. Defendant, when arrested, had similar scratches on his arm, and was carrying a pair of gloves. No such nexus between courier and any defendant has been established in the present case.

The case must be remanded for a limited post-trial hearing because of the presence in the jury room during the trial of two books, concerning drug traffic, drug problems, and people involved in drugs, that were not in evidence. The books were "Merchants of Misery," by J. A. Buckwalter, published by Pacific Press Publishing

Association, Mountain View, Calif., and "Up Tight," by John Gimenez as told to Char Meredith, published by Word Books, Waco, Texas. "Merchants of Misery" was the more susceptible of influencing the juror. It concerns large-scale drug business carried on by criminal syndicates, which is the type of operation these defendants are claimed to have had.

The books were discovered on the seventeenth trial day, the last day of taking of testimony, when the trial judge and attorneys went into the jury room for the court to hear a legal argument out of the hearing of the jury. All defendants called the books to the attention of the court and moved for a mistrial, which was denied. The books were left in the jury room. A motion was made that they be obtained and the prefaces read into the record. The trial judge declined on the ground that to take the books away from the jury would only call attention to the problem. No inquiry was made of jurors to ascertain the extent, if any, that the books had been seen by members of the jury and discussed. Since no inquiry was ever made, the exact circumstances of the books being in the room were not established. The supposition is that one of the jurors brought them from a church library in Ft. Lauderdale, since the name of the library appears in at least one of the books. No corrective or cautionary instruction was given when the books were discovered and called to the court's attention or when the jury was charged. However, at the end of the proceedings on the day of discovery the court instructed the jury not to read newspapers or listen to news broadcasts, and added this:

> Let me say one other thing. I hate to restrict you on your reading. However, until after this

> case is over, don't read anything, unless you get a letter from someone in your family. If you have to read any books or anything that might give you new and independent ideas about any of this matter, don't discuss it with each other.

Rather than being an instruction not to read extrinsic matter concerning the subject matter of the trial, this was subject to the interpretation that such reading was permissible so long as not discussed with other persons.

At the conclusion of the trial, after the verdict was rendered, the defendants requested the court to inquire of the jurors to determine who had checked out the books and the location of the library. The United States objected, and the court refused the request. The books before us are stipulated to be correct copies.

The defendants are entitled to a new trial unless it can be said that there is no reasonable possibility that the books affected the verdict. Farese v. U.S., 428 F.2d 178 (5th Cir. 1970). In Farese the defendant was accused of interstate transportation of a fraudulent security. There was put in evidence an attache case which had a clean shirt in it. While examining the attache case the jury found $750 in cash in the shirt. There had been no testimony concerning any such sum — the only nexus was that the crime charged concerned monetary gain. This court reversed, applying the test of whether it could be said there was no reasonable possibility that the extrinsic matter affected the verdict. In U.S. v. Staples, 445 F.2d 863 (5th Cir. 1971), cert. denied, ___ U.S., ___, ___ L.Ed. 2d ___ (1972), law books had been left in the jury room. The judge interrogated the jurors and found

that only one had examined the books, and what he had seen was not relevant to the offense on trial. The test, therefore, was satisfied. Here, as in Farese, the extrinsic matter does not go directly to the offense charged but to the type of conduct and activities on trial. Stoehr v. U.S., 196 F.2d 276 (3d Cir.), cert. denied, 344 U.S. 826, 97 L.Ed. 643 (1952), is no help to the government. In a criminal income tax trial, the jury saw a movie about gangsters with remote references to income tax matters. The defense made no showing sufficient to place on the judge a duty to inquire. In his charge the court instructed the jury to disregard movies.

In framing relief which will give due regard to the rights of the government and of the defendants, we follow the procedure outlined by Judge Simpson in U.S. v. Barson, 434 F.2d 127, 131 (5th Cir. 1970). We remand to the District Court with directions to conduct an evidentiary hearing to determine whether there is or is not a reasonable possibility that the books affected the jury's verdict, Farese v. U.S., supra. Inquiry must be made into how the books reached the jury room; whether they were available to members of the jury and, if so, for how long; the extent, if any, to which they were seen, read, discussed and considered by members of the jury; and such other matters as may bear on the issue of the reasonable possibility of whether they affected the verdict.[4] The court shall make and certify to us findings of fact and conclusions of law together with a transcript of the hearing. Our determination of whether to affirm the judgments of conviction or

[4]Factors which go into cutting a Gordian knot of this kind are discussed in the dissenting opinion in U.S. v. McKinney, 429 F.2d 1019, 1031 (5th Cir. 1970), which opinion, on rehearing, became one of two opinions of the majority, U.S. v. McKinney, 434 F.2d 831 (5th Cir. 1970), cert. denied 401 U.S. 922, 27 L.Ed. 2d 825 (1971).

to reverse and remand for new trial will follow such certification. Jurisdiction of the appeal is retained in this court during the limited remand for the purpose stated.

Upon conclusion of the direct examination of each of several government witnesses, various of the defendants moved for production of the respective witnesses' testimony given before the grand jury. In each instance the motion was denied. Some of the witnesses had read the transcript of their respective grand jury testimony in preparation for testifying at the trial. The ground asserted for production was defendants' claim that the testimony at trial was inconsistent within itself, inconsistent with other statements, and inconsistent with the indictment. On appeal the claimed inconsistencies are said by defendants to be of particular importance because at least some of the witnesses concerned were convicted felons, or narcotics addicts, users and pushers, or both, and at least some were named as co-conspirators but not defendants.

Since Dennis v. U.S., 384 U.S. 855, 16 L.Ed. 2d 973 (1966), this circuit has continued to adhere to the rule that the defendant must make a showing of particularized need to be entitled to inspect grand jury minutes. U.S. v. Jenkins, 442 F.2d 429 (5th Cir. 1971); Barson v. U.S., 434 F.2d 127 (5th Cir. 1970); Posey v. U.S., 416 F.2d 545 (5th Cir. 1969), cert. denied, 397 U.S. 946, 25 L.Ed. 2d 127 (1970); James v. U.S., 416 F.2d 467 (5th Cir. 1969), cert. denied, 397 U.S. 907, 25 L.Ed. 2d 87 (1970); White v. U.S., 415 F.2d 292 (5th Cir. 1969), cert. denied, 397 U.S. 993, 25 L.Ed. 2d 400 (1970); Stassi v. U.S., 401 F.2d 259 (5th Cir. 1968), vacated on other grounds sub nom. Giordano v. U.S., 394 U.S. 310, 22 L.Ed. 2d 297 (1969); Nolan v. U.S., 395 F.2d 283 (5th Cir. 1968);

Menendez v. U.S., 393 F.2d 312 (5th Cir. 1968), cert. denied, 393 U.S. 1029, 21 L.Ed. 2d 572 (1969). Our position is contrary to the rule established in some other circuits which dispense with a required showing of a particularized need. See U.S. v. Amabile, 395 F.2d 47 (7th Cir. 1968), vacated on other grounds sub nom. Giordano v. U.S., 394 U.S. 310, 22 L.Ed. 2d 297 (1969); Allen v. U.S., 390 F.2d 476 (D.C. Cir. 1968); U.S. v. Youngblood, 379 F.2d 365 (2d Cir. 1967). Unlike several courts, see Cargill v. U.S., 381 F.2d 849 (10th Cir. 1967), cert. denied, 389 U.S. 1041, 10 L.Ed. 2d 831 (1968), Schlinsky v. U.S., 379 F.2d 735 (1st Cir.), cert. denied, 389 U.S. 920, 19 L.Ed. 2d 265 (1967), we have not read Dennis as equating an asserted need for grand jury minutes in order to impeach a government witness with the particularized need required for inspection. See Nolan v. U.S. supra; Menendez v. U.S., supra. While our decisions have stressed the need for maintaining the secrecy of grand jury proceedings, Nolan v. U.S., supra; Menendez v. U.S., supra, especially to prevent loss of testimony through fear of retaliation and to protect the independence of the grand jury, Posey v. U.S., supra, we have recognized, as we must, the need for lifting the veil of secrecy when there is an actual discrepancy between a witness' grand jury and trial testimony. So that the grand jury's realm will be invaded no more than necessary we have approved as the initial step in response to motions for inspection an in camera inspection conducted by the district judge to discover any such inconsistencies. See Barson v. U.S., supra; James v. U.S., supra; Menendez v. U.S., supra. Disclosure of grand jury minutes is thus a matter committed to the sound discretion of the district judge for evaluation in light of the particularized need alleged. In reviewing the exercise of that discretion, keeping in mind the desire for

a balance between the need for secrecy and fairness to the defendant in presenting his defense, we have deemed relevant the availability of Jencks Act material as an alternative source of statements impeaching the witness whose grand jury testimony is sought. See U.S. v. Barson, supra; James v. U.S. supra; Posey v. U.S., supra.

We conclude that the trial judge did not commit reversible error in denying defendants access to the minutes. In reaching that view we bear in mind that the only asserted particularized need was the desire to search for impeaching material for use in cross examination, that as to some of the witnesses the trial judge made an in camera inspection of the minutes and found no inconsistencies, and that as to at least some of the witnesses defendants were given Jencks Act material for use in cross examination. We have pointed out that the policy of protecting individuals who have given information to the grand jury with respect to commission of crime is a wise one, but that "once the individual has been called as a witness at trial and his testimony made public, this principle in the run of the mill case is of slight if any weight." Barson, supra, at 129. But this is not a routine case. The record is replete with evidence of organized crime and of misconduct of all sorts, and of far reaching and intricate criminal organization in many countries and in several parts of the United States, and some of the defendants were at large at the time of trial. As we pointed out in Barson, when there is a compelling need for secrecy to protect individuals even fair play does not demand that a defendant be allowed access to the grand jury minutes for impeachment purposes. We have considered the fact that in this instance, as in Barson, the trial judge examined testimony of some government witnesses in camera (and found no incon-

sistency) but, with no apparent reason for the distinction, declined to examine that of other government witnesses of no less importance. Nevertheless, because of the other factors we have enumerated, we are of the view that the present trial judge's allowable range of discretion was not exceeded.

If admission into evidence of the cocaine brought into the country by Denise Bethancourt[5] was error, as to the conspiracy count it was harmless beyond reasonable doubt. There had been day after day of testimony by witness after witness of the details of bringing in shipments of cocaine in the same manner, and of the financing of and arrangements for the shipments, and of distribution of cocaine thus brought in. It was not reversible error for the jury to see the seized fruits of a single shipment that was not sufficiently tied to the Count One defendants. Similarly, if it was error to admit into evidence two packages of heroin purportedly sold by Paz to an undercover agent — and the question is a close one — it was not reversible. This was only one item of an overwhelming mass of testimony relating to Paz's involvement as a central figure in the conspiracy.

The volunteered statement by a witness that he had come to Miami with two marshals and with defendant Paz handcuffed to him was not reversible error. In context it was little more prejudicial than a statement that Paz had been arrested. While Paz had not testified and thus had not put his character in issue, there was not, as in Odom v. U.S., 377 F.2d 853 (5th Cir. 1967), a plain refer-

[5]See part 2, supra.

ence to a prior offense committed by a defendant; indeed, it is unclear whether the reference related at all to a different offense.

There is no merit to the contention of Acosta that a display of photographs from which witness Gloria Richards selected a picture of co-conspirator Jesus Alvarez was impermissibly suggestive.

Other contentions raised by defendants either do not require, or do not deserve, comment.

AFFIRMED in part. All convictions under Count Two are REVERSED. The case is REMANDED for the limited purpose of an evidentiary hearing, and jurisdiction of the appeal is otherwise retained.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28997

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE ESPINOSA, CLARENCE JACKSON AND CARLOS INCHAUSTEGUI,

Defendants-Appellants,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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(February 12, 1973)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: This narcotics case was remanded to the District Court for a limited post-trial hearing on the issue of whether there is or is not a reasonable possibility that the verdict of the jury was affected by the presence in the jury room, on the last day of taking testimony, of two books that were not in evidence. The books concerned drug traffic, drug problems, and people involved in drugs. The factual circumstances requiring the

remand order and the directions given to the District Court for an evidentiary hearing appear in our prior opinion, Paz v. U.S., 462 F.2d 740 (5th Cir. 1972).

The trial judge has conducted an evidentiary hearing as directed, the transcript thereof[1] and the trial judge's findings and conclusions have been certified to us, and the parties have filed briefs on the remand issue. In the hearing each juror and alternate was interrogated out of the presence of the other jurors. As each appeared the court interrogated him first and then gave counsel the opportunity to examine. Following the hearing the trial judge entered a lengthy order containing detailed findings of fact and conclusions of law.

The procedure followed by the trial judge and the standards employed by him complied with our remand directions. We find no error in the trial judge's conclusion that there is no reasonable possibility that the books — brought to the court by an alternate juror who did not participate in the jury's deliberations — affected the verdict.

The evidentiary hearing brought to light the possibility that a pamphlet, received by the same alternate juror (a dentist) in his professional capacity and listing the names of some drugs, may have been brought into the jury room. The District Court reached the conclusion that there was no reasonable possibility that the pamphlet — if brought into the jury room at all — affected the verdict. We find no error in that conclusion.

The findings and conclusions of the District Court on remand are AFFIRMED. This requires that the convictions under Count I be, and they hereby are, AFFIRMED.

[1]More than 100 pages long.

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 28997

PEDRO LUIS RODRIGUEZ Y PAZ, RAUL CIRILO FERNANDEZ, FERNANDO ACOSTA, LUCRECIA LUM, ANNA ECHAVARRY, DULCE, ESPINOSA, CLARENCE JACKSON AND CARLOS INCHAUSTEGUI,

Defendants-Appellants,

versus

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion Feb. 12, 1973, 5 Cir., 1973, ____ F.2nd ____).

(March 26, 1973)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges.

PER CURIAM: The Petition for Rehearing filed by appellant, Fernando Acosta and adopted by appellants, Espinosa, Lum, Echavarry, Fernandez, Inchaustegui and Jackson is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.